

RENDERED: September 6, 1996; 10:00 a.m.
TO BE PUBLISHED

96-CA-1016-WC

LEE KYLE CUMMINS

APPELLANT

PETITION FOR REVIEW UNDER CR 76.25
v. OF A DECISION OF THE WORKERS' COMPENSATION BOARD
WC-95-1656

COMMONWEALTH OF KENTUCKY/
CABINET FOR WORKFORCE DEVELOPMENT,
KENTUCKY DEPARTMENT FOR ADULT &
TECHNICAL EDUCATION/KENTUCKY TECH
SOUTHEAST REGION/HAZARD STATE
VOCATIONAL TECHNICAL SCHOOL;
HON. WILLIAM O. WINDCHY,
Acting Director of Special Fund;
HON. SHEILA C. LOWTHER,
Chief Administrative Law Judge; and
KENTUCKY WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
REVERSING AND REMANDING

* * * * *

BEFORE: DYCHE, HOWERTON, and SCHRODER, Judges.

HOWERTON, JUDGE. Lee Kyle Cummins petitions for review of an opinion of the Workers' Compensation Board (Board) rendered on March 29, 1996. The Board affirmed an award of the Administrative Law Judge (ALJ) favorable to Cummins, but which failed to assess a 15% safety penalty against Cummins' employer, Hazard State Vocational Technical School (Hazard State) pursuant to KRS 342.165. We reverse and remand for further proceedings.

On January 12, 1995, Cummins filed a claim for workers' compensation benefits for injuries he received as a result of exposure to toxic chemicals while employed as a teacher at Hazard State. Cummins taught courses involving heating, air conditioning, and refrigeration and regularly worked with various freons, acids, oils and lubricants, bonding compounds, and brazing and soldering materials. His last date of exposure was January 20, 1993, and he has not been employed since. Cummins claimed that the exposure to the toxic chemicals resulted in psychiatric problems, memory loss, hearing loss, and difficulty with balance. Cummins maintained that these problems prevented him from seeking any type of employment.

At the hearing before the ALJ, Cummins' testimony established that there was no ventilation in the areas in which he worked, nor were proper gloves or respirators furnished to prevent exposure to the chemicals. Testimony was also provided from several doctors that the lack of safety devices resulted in exposure to the toxic chemicals which, in turn, directly caused Cummins' health problems. A safety coordinator from Hazard State provided an affidavit stating that he observed Cummins working with various chemicals and that the shop in which Cummins worked did not have a ventilation system.

After reviewing all of the evidence in the record, the ALJ concluded that Cummins had satisfied his burden of demonstrating that his mental and physical conditions were related to the chemical exposure occurring during the course of

his employment. The ALJ found that Cummins was permanently and totally occupationally disabled, and apportioned liability 25 percent to Hazard State and 75 percent to the Special Fund. However, the ALJ denied Cummins' request for a 15 percent safety penalty against Hazard State pursuant to KRS 342.165. The ALJ found that no specific statute or regulation was violated which would require the penalty. A motion for reconsideration was filed and denied.

On appeal to the Board, Cummins relied on KRS 338.031 which provides that an employer shall furnish a place of employment free from recognized hazards. Cummins argued that since the uncontradicted testimony proved he had worked in an unsafe environment and that Hazard State had violated the provisions of KRS 338.031, he was entitled to the assessment of the safety penalty pursuant to KRS 342.165. In affirming the ALJ, the Board, in pertinent part, wrote:

The provisions of KRS 342.165 which were in effect at the time of Cummins' last exposure to toxic chemicals:

If an accident is caused in any degree by the intentional failure of the employer to comply with any specific statute or lawful regulation made thereunder, communicated to such employer and relative to installation or maintenance of safety appliances or methods, the compensation of which the employer would otherwise have been liable under this chapter shall be increased fifteen percent in the amount of each payment. . . .

Cummins argues that KRS 338.031 under the chapter entitled "Occupational Safety & Health of Employees" is the specific statute

which has been violated by Hazard State.
That provision provides that each employer:

(a) Shall furnish to each of
his employees employment and a
place of employment which are free
from recognized hazards that are
causing or are likely to cause
death or serious physical harm to
his employees; . . .

Cummins cited this statute in his brief
before the ALJ; however, the ALJ found that
Cummins had cited to no specific statute or
regulation in support of his argument. We
agree with the ALJ; hence, we affirm.

The Board believes that the emphasis of
KRS 342.165 is for a failure to comply with a
specific statute or regulation which
establish [sic] particular safety standards.
We do not believe that the Legislature
envisioned assessment of a penalty for a
violation of a general standard of failing to
furnish a safe place to work. (Citation
omitted).

Cummins argues to this Court that in light of the
evidence, it was error not to assess a 15 percent safety penalty
against Hazard State. After reviewing the record and the
precepts set forth in Apex Mining v. Blankenship, Ky., 918 S.W.2d
225 (1996), we must remand this case to the Board for further
proceedings.

Blankenship addressed as a matter of first impression
whether the violation of KRS 338.031 constitutes a safety
violation for the purposes of KRS 342.165. The claimant in
Blankenship was injured while operating a road grader which had
defective brakes and could only be stopped by lowering the grader
blade. The ALJ determined that the employer knew of the defect
and had failed to repair it, thus constituting an intentional act

of noncompliance under KRS 338.031. On appeal, the Board rejected the employer's argument that a violation of KRS 338.031 did not constitute a violation under KRS 342.165. This Court agreed with the Board that the ALJ's findings on the issues of employer knowledge and causation were supported by substantial evidence which conformed to the requirements of KRS 342.165.

Our Supreme Court, in affirming this Court, recognized that "KRS 338.031(1)(a) requires an employer to provide a workplace which is free from 'recognized hazards' that cause or are likely to cause death or serious physical harm, a requirement that is consistent with the purpose of KRS 342.165." Id.

Further, the Court wrote:

Although we recognize that KRS 338.031 is not as specific a statute as might be desirable, we are also mindful that the Workers' Compensation Act is social legislation which is to be construed liberally and in a manner consistent with accomplishing the legislative purpose. Therefore, we conclude that the particular violation of KRS 338.031(1)(a) which is presented by the facts of this case sufficiently complied with the requirements of KRS 342.165 to justify the imposition of a penalty. We believe that any other construction of KRS 342.165 on these facts would cause an absurd result which clearly would be at odds with the legislature's intent in enacting the provision.

In the instant case, it appears that the ALJ and the Board relied on the fact that there is no specific statute requiring ventilation in a workplace such as where Cummins was

employed, thus there could be no penalty assessed under KRS 342.165. We disagree. Cummins established that there was no ventilation and that he was not provided with safety equipment. We are of the opinion that this, at a minimum, violates the provisions of KRS 338.031. Further fact finding as to the employer's knowledge or reasonable lack of it is warranted.

The opinion of the Board is reversed and the matter is remanded to the ALJ for further proceedings in accordance with this opinion.

SCHRODER, JUDGE, CONCURS; DYCHE, JUDGE, DISSENTS BY SEPARATE OPINION.

DYCHE, JUDGE, DISSENTING. I must respectfully dissent from the majority opinion. Assuming for the sake of argument that Apex Mining v. Blankenship, Ky., 918 S.W.2d 225 (1996) would allow assessment of a penalty for intentional violation of the "safe workplace" statute (KRS 338.031), such penalty is not justified in this case; the evidence does not compel a finding that there was any intentional violation. I would affirm the Board's opinion.

BRIEF FOR APPELLANT:

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